

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 1, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2135

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT III

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STATE OF WISCONSIN,

**PLAINTIFF-RESPONDENT,**

v.

AMADO SALDANA, JR.,

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Brown County:  
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Amado Saldana, Jr., appeals an order denying postconviction relief under WIS. STAT. § 974.06.<sup>1</sup> He contends that his

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version.

constitutional rights to be free from double jeopardy and to have the effective assistance of counsel have been violated. He also contends that the State failed to personally deliver to him a copy of the amended information before arraignment, violating WIS. STAT. § 971.05(3) and his constitutional due process and equal protection rights. We disagree and affirm the order.<sup>2</sup>

## BACKGROUND

¶2 The district attorney filed an eight-count amended information alleging that Saldana drove his vehicle into another car, injuring both passengers. Saldana did not remain at the accident scene to give his name, address and vehicle registration as required by WIS. STAT. § 346.67(1). Saldana was apprehended and a blood test was administered, revealing a 0.27% by weight alcohol content. Saldana admitted that he had previously been convicted of operating a vehicle while under the influence of intoxicants.

¶3 The district attorney moved to dismiss five counts in exchange for Saldana's plea to the remaining three counts. He pled no contest to one count each of hit and run causing injury in violation of WIS. STAT. § 346.67(1); operating a motor vehicle while under the influence of intoxicants, second offense, in

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<sup>2</sup> Saldana's briefs also purport to appeal the 1997 judgment of conviction. The time for directly appealing the judgment has expired. See WIS. STAT. § 974.02.

The State argues that Saldana has waived his right to review of his postconviction motion under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because he failed to raise his current arguments in his prior postconviction motions. Waiver is a rule of judicial administration, not jurisdiction, and we have the discretion to make exceptions. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). Saldana contended in his reply brief that he was prevented from raising ineffective assistance of counsel arguments earlier because he was represented by the same counsel at trial and at the postconviction motion. For this reason, and because Saldana appears pro se, we chose to address the merits. See *State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 164-65, 582 N.W.2d 131 (Ct. App. 1998).

violation of WIS. STAT. § 346.63(1)(a); and causing great bodily harm by intoxicated use of a vehicle, contrary to WIS. STAT. § 940.25(1)(a). The court sentenced him to six and a half years in prison, one year less than the maximum incarceration allowable for the crimes. See WIS. STAT. §§ 346.65(2)(b), 346.74(5)(c),<sup>3</sup> and 939.50(3)(d). He now appeals.

## I. DOUBLE JEOPARDY

¶4 Saldana argues that the three convictions violate his right to be protected from multiple punishments for the same offense, citing *North Carolina v. Pearce*, 395 U.S. 711, 717-18 (1969). We disagree.

¶5 Multiple convictions for the same offense violate the double jeopardy protections found in the Wisconsin and United States Constitutions. U.S. CONST. amend. V; WIS. CONST., art. I, § 8; *State v. Saucedo*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). Determining whether multiple charges violate constitutional protections presents a question of law that we review independently of the trial court. *State v. Kanarowski*, 170 Wis. 2d 504, 509, 489 N.W.2d 660 (Ct. App. 1992).

¶6 Wisconsin uses a two-prong test to analyze multiplicity claims. *Saucedo*, 168 Wis. 2d at 493. First, we determine if the offense is identical in law and fact by applying the "elements-only" test found in *Blockburger v. United States*, 284 U.S. 299 (1932). *Saucedo*, 168 Wis. 2d at 493. This test has been

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<sup>3</sup> We note that the penalty in WIS. STAT. § 346.74(5)(c) (detailing the penalties for violating WIS. STAT. § 346.67(1)) actually had a limit of two years' imprisonment. However, the plea agreement mistakenly notified Saldana that the violation had a one-year maximum. The court sentenced him to one year of imprisonment for this violation.

codified in WIS. STAT. § 939.66(1).<sup>4</sup> If each statutory crime requires proof of an element not required by another, then we presume the legislature intended to permit cumulative convictions unless other factors clearly indicate otherwise. *Sauceda*, 168 Wis. 2d at 495.

¶7 In the second prong of the test, we review the legislative intent to determine whether contrary factors exist. *Id.* "The overall test is one of fundamental fairness or prejudice to the defendant." *State v. Hirsch*, 140 Wis. 2d 468, 471-72, 410 N.W.2d 638 (Ct. App. 1987).

¶8 Saldana pled no contest to violations of WIS. STAT. §§ 940.25(1)(a), 346.67(1), and 346.63(1)(a). Each of these violations requires the State to prove an element not required by the other offenses. WISCONSIN STAT. § 346.67(1) requires the State to prove that Saldana (1) operated a vehicle, (2) which was involved in an accident resulting in injury or death, and (3) that Saldana failed to stop his vehicle and failed to fulfill all statutory requirements, including rendering aid to the victims. This third element is not required under the other two statutes.

¶9 WISCONSIN STAT. § 940.25(1)(a) requires the State to prove that Saldana (1) caused great bodily harm to another person, (2) while operating a vehicle, and (3) while under the influence of an intoxicant. The other two counts do not require proof that the victim suffered great bodily harm. Although WIS.

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<sup>4</sup> WISCONSIN STAT. § 939.66 provides in part:

**Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

(1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

STAT. § 346.67(1) requires proof of injury or death, it could be violated with an injury that is not "great bodily harm." Further, § 346.67(1) also does not require the defendant to be under the influence of an intoxicant.

¶10 A second offense of WIS. STAT. § 346.63(1)(a) requires the State to prove that Saldana (1) operated a motor vehicle, (2) while under the influence of an intoxicant or drug, and (3) the offense was his second conviction for operating under the influence of an intoxicant or drug. While § 346.63(1)(a) concerns the operation of a "motor vehicle," WIS. STAT. § 940.25(1)(a) requires the use of a "vehicle." In *State v. Smits*, 2001 WI App 45, ¶9, 241 Wis. 2d 374, \_\_\_ N.W.2d \_\_\_, we determined that the legislature intended the words "vehicle" and "motor vehicle" to mean two different things. The statutes in this case may thus be distinguished on the same grounds.

¶11 We therefore presume the legislature intended to permit cumulative punishments. See *Sauceda*, 168 Wis. 2d at 495. A defendant may rebut this presumption only if other factors indicate a contrary legislative intent. See *State v. Kuntz*, 160 Wis. 2d 722, 755, 467 N.W.2d 531 (1991). However, Saldana cites no authority indicating an alternative legislative intent. Therefore, he had not shown that his constitutional right to be protected from double jeopardy has been violated.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

¶12 Saldana next argues that his counsel was ineffective on several grounds. We conclude that Saldana's counsel's performance was not deficient, and therefore reject his ineffectiveness arguments.

¶13 For ineffective assistance of counsel claims, Wisconsin has adopted the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (holding that the *Strickland* analysis applies equally to ineffectiveness claims under the State constitution). A defendant must show both that counsel's performance was deficient and prejudicial to the defense. *Id.* If a defendant fails to adequately show one prong of this test, we need not address the second. *State v. Elm*, 201 Wis. 2d 452, 462, 549 N.W.2d 471 (Ct. App. 1996) (citing *Strickland*, 466 U.S. at 697).

¶14 Appellate review of a trial court's conclusion about ineffective assistance claims involves a mixed question of law and fact. *Id.* The trial court's assessment of the historical facts will not be set aside unless it is clearly erroneous. *See* WIS. STAT. § 805.17(2); *Sanchez*, 201 Wis. 2d at 236. Whether the representation was deficient and prejudicial is a question of law, which we review de novo. *Id.* at 236-37.

¶15 In order to establish deficient performance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986) (quoting *Strickland*, 466 U.S. at 688). A defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. ... [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (quoting *Strickland*, 466 U.S. at 690).

¶16 First, Saldana claims that his counsel was ineffective because he failed to investigate whether one of the victims had suffered "great bodily harm"

as required for a violation of WIS. STAT. § 940.25(1)(a). He argues that counsel would have discovered that the accident did not cause great bodily harm had he examined the medical records. However, the trial record reveals that the victim suffered cervical damage in the accident and at sentencing continued to have severe headaches and a loss of feeling in her fingers. Saldana alleges no facts that would suggest that the injury was not severe enough to qualify as "great bodily harm" under the statute.

¶17 Next, Saldana claims that trial counsel was ineffective for failing to object to a breach of the plea agreement. Saldana states in his appellate brief that counsel "did not request that the appellant be sentenced to the county jail as to the plea agreement instead of being sentenced to prison." The plea agreement was set out on the record at the plea hearing. In exchange for Saldana's no contest pleas to three counts in the amended information, the prosecutor agreed to dismiss the remaining five counts. The written plea agreement states, "Cap recommendation at 5 years/[p]robation county jail - no prison." The court stated at the plea hearing:

Now, Mr. Saldana, did Mr. VandeLoo and you discuss the maximum penalties that I could impose as judge in this matter with regard to the three counts which you entered a plea?

....

THE DEFENDANT: Yes, we did.

....

THE COURT: Do you further understand, Mr. Saldana, that—that on this document indicates to me that there have been discussions between you and the District Attorney's office in which the District Attorney's office is going to be recommending probation, some period of time in the county jail, a probationary period of 5 years but they are not going to be coming in here and recommending prison. Is that your understanding of the agreement that you have with the State?

THE DEFENDANT: Yes, it is.

The sentencing transcript shows that both the prosecutor and defense counsel argued for a sentence of county jail time to be followed by probation. In the written plea agreement, Saldana initialed a statement indicating that he understood the judge was not bound by the plea agreement and that he could be sentenced to the maximum penalty. Further, Saldana orally acknowledged that the court was not bound by the plea agreement. Saldana has not shown that the State breached the plea agreement. Therefore, his counsel was not deficient for failing to object on those grounds.

¶18 Saldana next claims that trial counsel was ineffective for advising his client to plead "no contest" when counsel knew Saldana was suffering from an "insulin reaction" at the time of the accident. However, Saldana has alleged no facts to support this conclusory argument. The record shows that Saldana had a blood alcohol concentration of 0.27% at the time of the accident. Saldana's insulin reaction claim does not alter the fact that his blood alcohol content was almost three times over the legal limit of 0.10%. The negotiated plea agreement resulted in the dismissal of five counts and significantly reduced Saldana's exposure to penalties. Saldana's trial counsel provided reasonable advice to his client.

¶19 As discussed above, we concluded that Saldana's right to be free from multiple punishments for the same crime has not been violated. We therefore also reject his argument, to the extent he makes it, that his counsel was deficient for failing to assert a double jeopardy objection or advising him to plead no contest to all three violations.

¶20 Next, Saldana claims that trial counsel was ineffective for failing to object to the trial court's order making the sentence consecutive to a previous



sentence imposed on Saldana by another court in 1995. Saldana raised this issue on his previous appeal to this court, and we ruled that the trial court had statutory authority to make the current sentence run consecutive to the 1995 sentence. *State v. Saldana*, Nos. 98-1901-CR and 98-2677-CR, slip op. at 4 (Wis. Ct. App. Mar. 23, 1999).

¶21 Finally, Saldana claims that trial counsel was ineffective for failing to allow Saldana to read the presentence report. Saldana claims that he could have corrected factual errors in the report. However, he also made this argument on his previous appeal, and we concluded that Saldana had insufficiently supported his claim to merit review. *Id.* In this appeal, Saldana again fails to identify the report's factual errors upon which the trial court allegedly relied. *See State v. Littrup*, 164 Wis. 2d 120, 127, 473 N.W.2d 164 (Ct. App. 1991). Saldana's allegations are conclusory and insufficient to require an evidentiary hearing or to demonstrate prejudice. *See State v. Washington*, 176 Wis. 2d 205, 214-15, 500 N.W.2d 331 (Ct. App. 1993). Absent counsel deficiency, his claim for ineffective assistance of counsel must fail. *Elm*, 201 Wis. 2d at 462.

### III. ARRAIGNMENT

¶22 Saldana contends that he was not served a copy of the amended information pursuant to WIS. STAT. § 971.05(3).<sup>5</sup> However, the transcript reveals

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<sup>5</sup> WISCONSIN STAT. § 971.05 provides:

The arraignment shall be conducted in the following manner:

....

(3) The district attorney shall deliver to the defendant a copy of the information in felony cases and in all cases shall read the information or complaint to the defendant unless the defendant waives such reading. Thereupon the court shall ask for the defendant's plea.

that his counsel had received a copy of the amended information and had discussed it and the potential penalties with Saldana. His counsel also waived the formal reading of the information. The court's personal jurisdiction is not affected by personal service of an information on the defendant at the arraignment. *State v. May*, 100 Wis. 2d 9, 12-13, 301 N.W.2d 458 (Ct. App. 1980). Service of the information is intended to ensure that the accused has notice of the charges in order to enter a plea and prepare a defense for trial. *See State v. Koeppen*, 195 Wis. 2d 117, 123, 536 N.W.2d 386 (Ct. App. 1995). This due process requirement was met in the present case, as evidenced by the arraignment transcript. *Id.*

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

